Local 520, International Union of Operating Engineers, AFL–CIO *and* Massman Construction Company, et al. Cases 14–CC–2271 and 14–CE–80

April 6, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On July 20, 1994, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

As more fully set forth in the judge's decision, in the course of collective-bargaining negotiations with various employers in 1993, including Massman Construction Co., the Union demanded that any collective-bargaining agreement include a provision prohibiting the signatory employer from entering into a joint venture or joint work undertaking unless all parties to the contract for the joint venture also accepted and were bound by the collective-bargaining agreement.[2] Several Southern Illinois Builders' Association (SIBA) employers entered into collective-bargaining agreements containing the disputed clause proposed to them. Massman refused to agree to the disputed clause submitted to Massman. On September 10, 1993, the Union engaged in a 1-day work stoppage against Massman, including picketing Massman's Clark Bridge project. Many of Massman's employees honored the picket line, which resulted in the job being shut down for that day.

Section 8(e) of the Act provides, in pertinent part, that "[i]t shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person" 29 U.S.C. § 158(e). We agree with the judge that the joint venture provisions which the Respondent Union sought from Massman Construction, and entered into with the SIBA employers, violated "the basic prohibition of Section 8(e)." *Carpenters District Council of Northeast Ohio (Alessio Construction),* 310 NLRB 1023, 1025 (1993).[3] For the reasons that follow, we also find that the clauses are not protected by the construction industry proviso.[4]

The construction industry proviso provides that

> nothing in this subsection [8(e)] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

29 U.S.C. § 158(e). In *Alessio,* the Board held that the proviso did not protect an "anti-dual shop" clause which would have required the extension of Alessio's collective-bargaining agreement with the union to affiliates of Alessio whose only linkage was common ownership and performance of the same type of construction work within the union's geographical jurisdiction. *Alessio,* supra, 310 NLRB at 1025–1026. In this regard, the Board held that the legislative history of the construction industry proviso "indicates that Congress sought only to preserve the status quo and the pattern of collective bargaining in the construction industry at the time the legislation was passed" in 1959. Id. at 1027.[5] The Board also concluded that, consistent with established principles of statutory construction, the construction industry proviso should not be given an expansive reading but should instead be read to exempt from 8(e)'s general prohi-

[1] The Respondent's request for oral argument is denied, as the issues presented in this case are adequately presented in the brief, exceptions, and record.

We will modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center,* 321 NLRB 144 (1996).

[2] The Union proposed several versions of its joint venture clause to Massman. The final proposed clause read as follows:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement for construction work that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirement of this provision.

The joint venture agreement which the Union proposed to, and eventually entered into, with certain employers (the "SIBA employers") reads as follows:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirement of this provision.

[3] In finding that the disputed clauses have a secondary objective, we rely additionally on the fact that the clauses would only be satisfied if the signatory employer's joint venturer signed a collective-bargaining agreement with the Union. The Board has previously recognized that such "union signatory" requirements are a clear indicia of a secondary objective, particularly because any primary objectives may be satisfied by a less-restrictive "union standards" clause. See, e.g., *Chemical Workers Local 6-18 (Wisconsin Gas),* 290 NLRB 1155 (1988).

[4] The judge's decision contains no formal conclusions of law, and it is not clear whether the judge specifically considered the applicability of the proviso to the disputed clauses in this case. The judge did comment that, under certain circumstances, "the effect of the [joint venture] provision would obviously be secondary and would not be protected by the construction industry proviso." We disavow any implication in the judge's decision that the construction industry proviso does not protect agreements with secondary objectives. See, e.g., *Alessio,* supra, 310 NLRB at 1026 (citation omitted) ("[I]n enacting Section 8(e), Congress expressly provided that limited categories of secondary activity would be tolerated in certain industries. Congress embodied that policy in the construction industry proviso").

[5] In *Alessio,* the Board found no evidence that antidual shop clauses were part of the pattern of collective bargaining in 1959. *Alessio,* supra, 310 NLRB at 1027.

bition against secondary agreements only "those subjects expressly exempted by the proviso." Id. at 1029 (citing 2A *Sutherland Stat. Const*., Sec. 47.08 (4th ed. 1984)).[6]

Applying these principles to the facts of this case, we find no evidence that joint venture clauses like the clauses at issue in this case were part of the pattern of bargaining in the construction industry at the time of the proviso's enactment in 1959. The disputed clauses are not subcontracting agreements of the sort previously found lawful by the Board and the courts, but instead, like the antidual shop clause found unlawful in *Alessio,* are an attempt to control the signatory employer's business relationships.[7] Accordingly, as in *Alessio,* "we must 'strictly construe' the proviso" and find that the disputed joint venture clauses fall outside its protections. *Alessio*, supra, 310 NLRB at 1029.[8]

For all the foregoing reasons, and consistent with the Board's decision in *Alessio,* we find that the disputed clauses violate the basic prohibition of Section 8(e) and are not protected by the construction industry proviso. We, therefore, find that by entering into a collective-bargaining agreement with the SIBA employers containing the disputed clause proposed to them by the Respondent Union, the Union violated Section 8(e). We additionally find, for the reasons stated by the judge, that an objective of the Union's September 10, 1993 work stoppage was to force or require Massman to enter into an agreement containing an essentially identical provision. Accordingly, we agree with the judge that the Union thereby violated Section 8(b)(4)(ii)(A).[9]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, Local 520, International Union of Operating Engineers, AFL–CIO, St. Louis, Missouri, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director of Region 14, after being signed the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material."

Lucinda L. Flynn, Esq., for the General Counsel.
Harold Gruenberg, Esq., of St. Louis, Missouri, for the Respondent.
Mark W. Weisman, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

I.

STEPHEN J. GROSS, Administrative Law Judge. This proceeding is about the joint venture form of doing business in the construction industry and about an attempt by the Respondent, Local 520 of the International Union of Operating Engineers, AFL–CIO (the Union or Local 520), to deal with what it perceives to be the potentially detrimental impact of that form of business arrangement on the well being of the Union's members.

In terms of the alleged violations of the National Labor Relations Act (the Act), at issue is whether Local 520: (1) engaged in a strike against Massman Construction Company (Massman) in an effort to force Massman to agree to a collective-bargaining agreement that included a provision that violated Section 8(e) of the National Labor Relations Act (the Act), thereby violating Section 8(b)(4) of the Act; and (2) entered into collective-bargaining agreements with various other employers, which agreements included provisions that violated Section 8(e).[1]

Local 520's geographical jurisdiction covers much of southwestern Illinois.[2] For more than 30 years Local 520 has represented all of the operating engineers whom Massman employed on construction projects located within Local 520's jurisdiction, and Massman has obtained such employees by referral from Local 520's hiring hall.[3] Thus the terms of the now-ended collective-bargaining agreement between Local 520 and Massman for the period August 1990 through July 31, 1993, provided that Local 520 would be the exclusive collective-bargaining agent of all operating engineers whom Massman employed "within the territorial jurisdiction of the Union,'' and that Local 520 would be Massman's "sole and exclusive source of referral of applicants for employment'' as operating engineers.

[6] Because the proviso did not expressly address antidual shop clauses, the Board in *Alessio* strictly construed the proviso and found that the antidual shop clause fell outside its protection. *Alessio*, supra, 310 NLRB at 1029.

[7] See also Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616, 630 (1975):

> Congress limited the construction-industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on a jobsite. In contrast to the latitude it provided in the garment-industry proviso, Congress did not afford construction unions an exemption from Section 8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon.

[8] Member Hurtgen also relies on the fact that the SIBA clause was not confined to construction work. The omission of the words "construction work" in the SIBA agreement is especially revealing because those words were added to the proposal made to Massman. In sum, the Respondent knew how to confine the clause to construction work, and it chose not to so confine the clause in the SIBA contract.

[9] Sec. 8(b)(4)(A) prohibits any labor organization from striking or picketing to obtain an agreement which is prohibited by Sec. 8(e). See, e.g., *Ironworkers Pacific Northwest Council (Hoffman Construction),* 292 NLRB 562 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990).

[1] The General Counsel does not allege that any of the employers that entered into such agreements thereby violated the Act.

[2] See art. 8 of Local 520's collective-bargaining agreements.

[3] By "operating engineer'' I mean members of the bargaining unit specified in art. I of Local 520's collective-bargaining agreements.

The dispute between Local 520 and Massman that is of concern to us here arose entirely out of the Union's insistence that a proposed 1993–1996 collective-bargaining agreement include a new, one-paragraph-long, provision applicable to joint ventures and to "joint work undertaking[s] or arrangement[s]." And it is the inclusion of a comparable provision in Local 520's collective-bargaining agreements with other employers that led to the General Counsel's 8(e) allegations.

Massman filed its unfair labor practice charge in Case 14–CC–2271 on September 10, 1993. The Southern Illinois Builders' Association (SIBA), an association of commercial contractors, filed the charge in Case 14–CE–80 on September 17. (Wherever I omit the year when referring to a date, the event in question occurred in 1993.) The consolidated complaint issued on December 17 and was amended at the hearing. I held the hearing in this matter in St. Louis, Missouri, on April 13, 1994. Local 520 admits that Massman and the various members of SIBA who signed the collective-bargaining agreements that are the subject of this proceeding are all employers engaged in commerce within the meaning of Section 2(2) and (6) of the Act, that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that the Board has jurisdiction over this matter.

II.

Black's Law Dictionary defines a joint venture as "a legal entity in the nature of a partnership engaged in a joint undertaking of a particular transaction for mutual profit." See also *National Football League*, 309 NLRB 78 (1992): "By definition . . . a joint venture is a joint business undertaking by two of more parties who agree to share the risks as well as the profits of the venture." "Unlike a partnership," *Black's* says (citing the Internal Revenue Code as authority), "a joint venture does not entail a continuing relationship among the parties." Joint ventures are commonplace both in American industry generally[4] and in the construction industry in particular.[5]

Massman has been a party to a number of joint ventures. Generally Massman has taken that step in order to lessen its financial exposure (relative to undertaking a construction project itself), or to obtain financial support for its performance of large projects, or for both reasons. The record contains relatively detailed information about one of Massman's joint ventures. I am going to describe that joint venture, and the circumstances surrounding it, in order to give the reader a framework in which to consider the contractual provision that Local 520 sought to impose on Massman and that is part of the agreements that the Union has with numerous other employers.

The Clark Bridge spans the Mississippi River at Alton, Illinois. In or before early 1991 the State of Illinois announced that it would be seeking bids for the construction of the Missouri approach to the Clark Bridge. (I will sometimes refer to that construction as the Clark Bridge project.) Massman was interested in becoming the general contractor for the Clark Bridge project. But the project was a large one, and Massman did not want to carry alone the entire financial risk that being the general contractor on the project necessarily entailed. Accordingly in March 1991 Massman entered into a joint venture with Ben Hur Construction Company, an employer that is not a party to a collective-bargaining agreement with Local 520. It was the Massman-Ben Hur joint venture that bid on—and won—the contract for the Clark Bridge project.

Joint ventures come in all sizes and shapes. Here Massman and Ben Hur contemplated that Massman would be in charge of the construction work; Ben Hur was to be "purely a financial partner" (in the words of a Massman official). The particulars of the joint venture are spelled out on what appears to be a standard form headed "Pre-bid and Joint Venture Agreement." Under that agreement:

> 1. Massman had an 80-percent interest in the Clark Bridge project, Ben Hur 20 percent, in terms of profits, losses, ownership of the joint venture's property, and liabilities.
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> 2. "The overall management and control of the affairs" of the joint venture was "vested in the joint venturers." Massman and Ben Hur each had "an equal vote in such management and control." Management of the joint venture was to "be conducted pursuant to policy established by the parties acting through a Policy Committee." The policy committee, in turn, had two members, a Massman vice president and Ben Hur's chairman.
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> 3. Massman was designated "the Managing Party" of the joint venture "and as such" had "general charge of and supervision over the work to be performed under the [joint venture] Contract and all matters relating . . . thereto, but subject in all respects to the superior authority and control of the Policy Committee."
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> 4. As the managing party, Massman was to keep a "Project Manager" at the site whose duty it was "to supervise, manage and direct the work required by the Contract." (Massman named one of its supervisors to be the project manager.)

When the joint venture won the bid to handle the construction for the Clark Bridge project, it hired employees (none of whom were operating engineers) to perform construction work on the project, it let subcontracts, it obtained its own telephone number at the project site, and it acquired its own stationary (which gave as the joint venture's address and telephone number the address and telephone number of Massman's headquarters). Massman became one of the joint venture's subcontractors.

As of the date of the hearing the Clark Bridge project and the work of the Massman-Ben Hur joint venture were complete except for some paperwork.

III.

As touched on earlier, Massman was party to a collective-bargaining agreement with Local 520 that expired on July 31, 1993. Many of Local 520's collective-bargaining agreements expired at that time, and in late June or early July Local 520 entered group negotiations with SIBA (the contractors' associa-

[4] See, e.g., *Palace Performing Arts Center*, 312 NLRB 950 (1993); *Steam Coal Sales, Inc.,* 312 NLRB No. 59 (Sept. 22, 1993) (not reported in Board volumes); *Atlantic-Pacific Management*, 312 NLRB 242 (1993); *Rangaire Co*., 309 NLRB 1043 (1992); *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146 (1992); *Circuit-Wise, Inc*., 306 NLRB 766 (1992); *Consolidation Coal Co.,* 305 NLRB 545 (1991*); Galleria Joint Venture St. Clair Management Co.,* 303 NLRB 815 (1991); *Ring Can Corp.,* 303 NLRB 353 (1991); *Asbestos Carting Corp*., 302 NLRB 197 (1991*); Keeler Brass Automotive Group,* 301 NLRB 769 (1991); *Decker Coal Co.,* 301 NLRB 729 (1991).

[5] See, e.g., *Grassetto USA Construction,* 313 NLRB 674 (1994); *Cement Masons Local 528 (General/Rainier),* 310 NLRB 153 (1993); *Dichello Construction,* 307 NLRB No. 76 (May 4, 1992) (not reported in Board volumes); *Miller Electric Co.,* 301 NLRB 294 (1991).

tion referred to earlier) and various contractors looking toward follow-on agreements. Massman was one of the contractors that participated in the negotiations. Massman ended its participation in these group negotiations because, in part, Local 520 kept insisting that the follow-on agreements all include a provision covering joint ventures, which provision Massman considered to be unduly broad.

Massman and Local 520 began their individual bargaining with one another on August 27. The Union proposed that Massman enter into a collective-bargaining agreement that included the following provision:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirement of this provision.

This was akin to the proposal that caused Massman to leave the group negotiations, and Massman objected to it. (Massman also objected to three other provisions in the proposed agreement. But those objections were quickly resolved.) Massman voiced the concern that, under the provision, in order to enter into a joint venture Massman would be required to have its joint venturers agree to the terms of the Local 520 collective-bargaining agreement even in respect to work unrelated to the joint venture. Let us use Massman-Ben Hur joint venture as an example, and recall that Local 520 did not represent any of Ben Hur's employees. As Massman's representatives read the Union's joint venture provision, it would require that Massman have Ben Hur agree to abide by the terms of the Local 520 collective-bargaining agreement for all of Ben Hur's work within the jurisdiction of Local 520, whether or not that work was connected with either Massman or the Clark Bridge project.

One of the union negotiators told the Massman representatives that that was not the intent of the provision. But when the Massman representatives suggested rewriting the provision to more accurately reflect the Union's intent, the Union's representatives refused. That provoked Massman into sending a letter to Local 520 contending that the Union's proposed joint venture provision "is unlawful under Section 8(e) of the National Labor Relations Act.'' A day later Massman again wrote to Local 520, proposing that the provision in dispute be amended by adding the words "for this project only.''[6]

At the second bargaining session between Massman and Local 520, on September 7, the Local 520 representatives again insisted that Massman agree to the Union's version of the joint venture provision. Massman responded with another proposed modification (with the italicized language showing Massman's proposed addition to Local 520's proposal):

> The Employer shall require as a condition for entering into any into any joint venture of joint work undertaking or arrangement that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement *for the project for which the joint venture, joint work undertaking or arrangement was formed*. The Employer shall be responsible for compliance with the requirement of this provision.

The impression I got from listening to the parties' testimony and considering the exhibits that the parties submitted is that this version in fact represented the Union's intent. But Local 520's representatives somehow read Massman's proposal as altering the scope of the collective-bargaining agreement so that Massman itself would be bound by the terms of the collective-bargaining agreement only "for the project for which the joint venture, joint work undertaking or arrangement was formed.'' The Union accordingly rejected Massman's proposal, saying that Massman had to sign the joint venture provision as Local 520 had proposed it to Massman on August 27 and that Massman had to accept it because that is what other contractors had agreed to. A representative of Local 520 threatened that the Union would go out on strike against Massman if the company refused to sign a collective-bargaining agreement that included the Union's joint venture provision.

The following day (September 8) Local 520 revised its joint venture proposal by adding the words "for construction work'' to its previous proposal. As revised, the joint venture provision read:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement *for construction work* that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirement of this provision.

On September 9 Massman rejected the revision, saying that the change was not a meaningful one and that the provision continued to violate Section 8(e). The Union again threatened a strike. The following day, September 10, Local 520 did institute a 1-day strike against Massman. Throughout the workday on September 10 Local 520 picketed the site of the Clark Bridge project with signs reading:

NOTICE TO PUBLIC
MASSMAN CONST. CO.
ON STRIKE
LOCAL 520 IUOE

Employees of other employers
are not requested
to refrain from work or
performing services

Many of Massman's employees (in addition to the operating engineers) honored the picket line, shutting down work for the day.

At the time of the hearing Massman still had not entered into a collective-bargaining agreement with Local 520.

IV.

Section 8(e) reads, in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees . . . to cease doing business with any other person, and any contract

[6] As amended the provision would read: "The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement *for this project only*. The Employer shall be responsible for compliance with the requirement of this provision.''

> or agreement entered into . . . containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

A strike by a union to compel an employer to agree to a provision that would violate Section 8(e) constitutes a violation by the union of Section 8(b)(4)(ii)(A).[7] E.g., *Iron Workers Northwest Council (Hoffman Construction),* 292 NLRB 562 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990); *Colorado Building & Construction Trades,* 239 NLRB 253 (1978). For the reasons stated below, my conclusion is that had Massman agreed to a collective-bargaining agreement that included the joint venture provision sought by Local 520, the agreement would have violated Section 8(e) and that, accordingly, Local 520 violated Section 8(b)(4).

Local 520's Concern About Joint Ventures

Initially, I note that Local 520 is not the first union to have become concerned about the impact of the joint venture form of doing business on the well being of the union's members. See *Plumbers Local 38 (Bechtel Corp.),* 306 NLRB 511, 543 (1992); *Cascade General,* 303 NLRB 656, 666 (1991); *St. Joseph Equipment Corp.,* 302 NLRB 47 fn. 3 (1991).[8]

A joint venture like Massman-Ben Hur plainly is an entity distinct from either Massman or Ben Hur. See *Grove Shepherd Wilson & Kruge,* 109 NLRB 209 (1954); *Woodworkers Local 5-265 (Willamette Lumber),* 107 NLRB 1141 (1954); cf. *Grassetto USA Construction,* supra. (By so stating I do not mean to preclude the possibility that Massman and the Massman-Ben Hur joint venture might be deemed a single employer. On the other hand I do find that, contrary to the assertion of Local 520, Massman-Ben Hur and Massman are not alter egos of one another.) Thus Massman's collective-bargaining agreement with Local 520 would not apply to Massman-Ben Hur. Cf. *Peter Kiewet Sons' Co.,* 231 NLRB 76, 78 (1977). The upshot of this is that Massman, by entering into a joint venture to perform construction work in circumstances where, but for the joint venture form of business relationship, it would perform the work itself, can—from the Union's viewpoint—escape from the obligations of its collective-bargaining agreement with Local 520.

Focusing on the Clark Bridge project, Massman, operating as a subcontractor, employed the operating engineers needed for the construction. But the joint venture was not under any contractual obligation to Local 520 to handle the operating engineer work that way; thus Massman-Ben Hur could have itself employed the operating engineers or contracted out the operating engineer work to a company other than Massman. In that case the joint venture would have been under no obligation to utilize the referral services of Local 520 when hiring operating engineers or otherwise to abide by the terms of Massman's agreement with the Union. That could have affected the job opportunities of members of Local 520 at Massman and at other employers engaged in work on the Clark Bridge project as subcontractors. In that latter respect the point is that Massman's agreement with Local 520 provided that "This Agreement shall bind all subcontractors as a party to this agreement.''[9] Since the Massman-Ben Hur joint venture had no agreement with Local 520, there was no requirement that the joint venture's subcontractors be bound by the terms of Local 520's collective-bargaining agreements. In sum, the fact that the joint venture became the general contractor instead of Massman could have resulted in, among other things, members of Local 520 losing employment opportunities and union and nonunion construction employees being put to work side by side. See *Connell Construction Co. v. Plumbers Local 100,* 421 U.S. 616, 630 (1973); *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612 (1967).

What all this adds up to is that if the provision sought by Local 520 was limited to requiring that, in circumstances resembling the Massman-Ben Hur joint venture, Massman had to have the joint venture entity accept the Local 520 collective-bargaining agreement, one could readily argue that, since Massman was in a position to control the joint venture, the provision had a primary, not secondary, objective and that it accordingly did not violate Section 8(e). See *National Woodwork,* supra; *Operating Engineers Local 701 (Lease Co.),* 276 NLRB 597, 600 (1985); cf. *Alessio*. However I need not, and do not, decide whether, if the coverage of the provision were limited to such situations, the provision would in fact pass muster under Section 8(e). That is because the joint venture provision sought by Local 520 covers more than the kinds of circumstances we have been discussing.

The Scope of the Provision Sought by Local 520

As discussed earlier, the last joint venture provision that Local 520 proposed to Massman reads:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement for construction work that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirement of this provision.

At the outset, it is by no means clear that the provision applies to joint venture entities created by joint venture agreements (to Massman-Ben Hur, for instance). The question is whether the joint venture entity can be deemed a "party'' to the "joint venture . . . contract.'' If the provision does not, then the entirety of the foregoing discussion (about the potential impact on Local 520 of Massman-Ben Hur being the general contractor instead of Massman) is beside the point. Local 520, however, argues that the provision is intended to apply to the joint venture entities, and I will here assume that the language of the provision can be read that way.

[7] It shall be an unfair labor practice for a labor organization or its agents—

> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

[8] Presumably it was this same concern that led to proposed language dealing with joint ventures making its appearance, albeit briefly, in the legislative history of Sec. 8(e). See *Carpenters District Council of Northeast Ohio (Alessio Construction),* 310 NLRB 1023, 1028–1029 fn. 20 (1993) (hereafter *Alessio*).

[9] Art. 7 of the Local 520-Massman 1990–1993 collective-bargaining agreement (and of the Union's 1993–1996 agreements).

But Local 520's proposed joint venture provision violates Section 8(e) even one focuses only on the entities created by joint venture agreements.

Consider, for example, a situation in which, like the actual one, Massman was party to a collective-bargaining agreement with Local 520 and Ben Hur was not, but in which the joint venture roles of Massman and Ben Hur were reversed—so that Ben Hur managed the construction work and Massman provided financial support only. Under those circumstances, Massman would have "no power to assign the work.'' *Alessio,* supra at 1026. (I recognize that in the Massman-Ben Hur joint venture, the "Policy Committee'' of the joint venture consisted of one representative of Massman and one representative of Ben Hur and that Massman, as the "Managing Party'' of the joint venture, was purportedly "subject in all respects to the superior authority and control of the Policy Committee''—to quote from the terms of the joint venture agreement. But the record makes it clear that, as a practical matter, Massman, as the managing party, ran the show.) Notwithstanding Massman's limited role in this hypothetical joint venture, under Local 520's joint venture provision Massman could enter into the joint venture agreement only if the Massman-Ben Hur entity agreed to be bound by the terms of the Massman-Local 520 collective-bargaining agreement.

In that circumstance the effect of Local 520's proposed provision would by no means be one of work preservation. I conclude, therefore, that if Local 520's joint venture provision applies to the joint venture entity created by a joint venture agreement, as Local 520 claims the provision does, the provision violates Section 8(e). That is because the provision would have secondary, and not primary, effects where: (1) the joint venturer designated to manage the construction work was not a party to a collective-bargaining agreement with Local 520; and (2) a joint venturer without the power to control the work was a party to such a collective-bargaining agreement.

Now consider the fact that the provision at issue applies to "all parties to the [joint venture] contract.'' The Union contends that its intention was that the provision's coverage would be limited to work on the project for which the joint venture was formed. And, for the moment, let us assume that the provision can be read that way and, further, that the provision does not apply to the joint venture entity itself. Still, once again the provision would violate Section 8(e)—for the same reasons just discussed in connection with the provision's presumed applicability to the joint venture entity.

Let us again use the Massman-Ben Hur joint venture as an example but change the facts slightly. Under this revised version, Massman remains the managing party of the joint venture and a subcontractor, but Ben Hur performs work on the collective-bargaining agreement project as a subcontractor. Again, a reasonable argument could be made that the effect of Local 520's joint venture provision would be a lawful one, this time because it is within the intent of the construction industry proviso:

> nothing in [Section 8(e)] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

And again, if one hypothesizes Ben Hur as the managing party (as well as a subcontractor), with Massman having no power to assign work, the effect of the provision would obviously be secondary and would not be protected by the construction industry proviso. See *Alessio,* supra at 1028, 1029.

Finally, there is the question of the applicability of the provision to work unrelated to the project for which the joint venture was formed. Again returning to the Massman-Ben Hur joint venture as an example of the workings of the provision, on its face the provision would seem to require Massman to have Ben Hur accept the terms of the Massman-Ben Hur collective-bargaining agreement even for work that was unrelated to Massman or the Clark Bridge project. Whether or not the joint venture agreement provided that Massman would manage the joint venture's work, that effect would obviously be secondary.

As previously noted, representatives of Local 520 told Massman that the Union's intent was that the provision would apply only to the work that the joint venture was formed to perform. (The Union's representatives made that point orally, during the prestrike negotiations with Massman, and in a post-strike letter.) But the General Counsel argues that the provision itself includes no such limitation, that the provision is unambiguous, and that it accordingly would be improper to consider what Local 520's representatives had to say, during negotiations, about the intent of the provision. See, in this connection, *Kal Kan Foods,* 288 NLRB 590, 592–593 (1988).

On the other hand: (1) it is plain from the language of the proposed provision that the focus of the provision is "joint venture . . . construction work''; (2) the provision does not specifically state that it is to be applicable to work unrelated to the joint venture; and (3) given the kind of problems for unions posed by business arrangements like the Massman-Ben Hur joint venture, one might reasonably presume that it was just such circumstances that led to the Union's proposal which, in turn, would suggest that the Union intended that the provision cover only the work to which a "joint venture or joint work undertaking or arrangement'' was applicable.

Under these circumstances it is not clear to me that what Union had to say during negotiations about the meaning of the provision should be ignored. Cf. *Teamsters Local 982 (J. K. Barker Trucking),* 181 NLRB 515, 517 (1970). Given these considerations I reach no conclusion about whether the provision applies to work apart from work on the project for which the joint venture or joint work undertaking or arrangement was formed.

Other Issues Related to the Massman-Local 520 Dispute

Joint work undertakings or arrangements. Local 520's proposed joint venture provision purports to apply not just to joint ventures, but also to "any . . . joint work undertaking or arrangement.'' Nothing in the record offers any clue about how, or if, a "joint work undertaking'' or a "joint arrangement'' might differ from a joint venture. Similarly nothing in the record gives any indication that there might be circumstances in which the applicability of the proposed provision to a joint venture would be lawful while the applicability of the provision to a joint work understanding or joint arrangement would not be.

Cease doing business. The joint venture provision that Local 520 demanded that Massman agree to could be said to violate Section 8(e) only if its effect would be to cause Massman "to cease doing business with any other person'' (to quote from Sec. 8(e)). The question is whether that criterion is met by a provision that could have the effect of causing Massman to

refrain from entering into a joint venture agreement. The answer is that it is: "The cease doing business element of Section 8(e) is satisfied by proof of prohibitions against forming business relationships in the first place as well as requirements that one cease business relationships already in existence.'' *Alessio,* supra at 1025 fn. 9.

The Dispute Between Local 520 and Massman—Conclusion

I have concluded that had Massman agreed to Local 520's joint venture provision, the provision would violate Section 8(e) whenever Massman became a party to a joint venture agreement in circumstances in which Massman had no power to control the work of the joint venture entity. That is because the provision would cause Massman to require that the joint venture entity and Massman's fellow joint venturers "accept and agree to be bound by the Local 520 collective-bargaining agreement,'' an effect that would have secondary, rather than primary, consequences. Local 520 threatened to cause Massman's employees to go out on strike against Massman, and then did cause a strike against Massman, in an attempt to coerce Massman into agreeing to the provision. Local 520 thereby violated Section 8(b)(4)(ii)(A).

V.

As noted earlier, in late June or early July of 1993 SIBA and a number of individual employers entered into negotiations with Local 520 looking toward collective-bargaining agreements for a term beginning August 1, 1993.

From the start of the negotiations, Local 520 insisted that any collective-bargaining agreement include a provision covering joint ventures. SIBA and the employer parties to the negotiations refused to accept the Union's initial joint venture proposal. Then, on about July 31, 1993, Local 520 presented its final set of contract proposals to the employers. They included a joint venture provision that read:

> The Employer shall require as a condition for entering into any joint venture or joint work undertaking or arrangement that all parties to the contract for such undertaking or arrangement accept and agree to be bound by this Agreement. The Employer shall be responsible for compliance with the requirement of this provision.

This is the same provision that the Union proposed to Massman about 4 weeks later in the Union's individual bargaining with Massman.

By mid-August Local 520 had signed collective-bargaining agreements with the following employers, which agreements included the above-quoted joint venture provision: Caldwell Engineering Co.; Halverson Construction Co.; Haier Plumbing & Heating, Inc.; Halverson Construction Co. and Midwest Foundation Corp., Joint Venture; C. D. Peters Construction Co.; RCS Construction, Inc.; and Waggoner Equipment Co., Limited Partnership.

For the reasons discussed in part IV, regarding the dispute between Local 520 and Massman, my conclusion is that, by entering into such agreements, Local 520 violated Section 8(e) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Local 520, International Union of Operating Engineers, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Engaging in a strike against, picketing, or threatening to engage in a strike against, Massman Construction Company for the purpose of causing that company to agree that it will not enter into any joint venture or joint work undertaking or arrangement unless all of the joint venturers and the entity created by the joint venture agree to be bound by the terms of the collective-bargaining agreement between the company and Local 520.

(b) Maintaining, giving effect to, or enforcing the joint venture clause in the collective-bargaining agreements it has with the employers listed below:

Caldwell Engineering Co.
C.D. Peters Construction Co.
Haier Plumbing & Heating, Inc.
Halverson Construction Co.
Halverson Construction Co. and Midwest Foundation Corp., Joint Venture
RCS Construction, Inc.
Waggoner Equipment Co., Limited Partnership

(c) Violating, in any like or related manner, Section 8(e) or Section 8(b)(4) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by a representative of Local 520, shall be posted by Local 520 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Local 520 to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail a copy of the notice to each of the employers with whom Local 520 has a collective-bargaining relationship, to Massman Construction Company, and to the Southern Illinois Builders Association.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

The National Labor Relations Board has found that the joint venture clause in our collective-bargaining agreements with the following employers is unlawful under Section 8(e) of the Act.

Caldwell Engineering Co.
C. D. Peters Construction Co.
Haier Plumbing & Heating, Inc.
Halverson Construction Co.
Halverson Construction Co. and Midwest Foundation Corp., Joint Venture
RCS Construction, Inc.
Waggoner Equipment Co., Limited Partnership

WE WILL NOT maintain, give effect to, or enforce those joint venture clauses.

WE WILL NOT engage in a strike against, or picket, or threaten to engage in a strike against Massman Construction Company for the purpose of causing that Company to agree that it will not enter into any joint venture or joint work undertaking or arrangement unless all of the joint venturers and the entity created by the joint venture agree to be bound by the terms of the collective-bargaining agreement between the Company and Local 520.

WE WILL NOT violate, in any like or related manner, Section 8(e) or Section 8(b)(4) of the National Labor Relations Act.

LOCAL 520, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO